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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 195.....

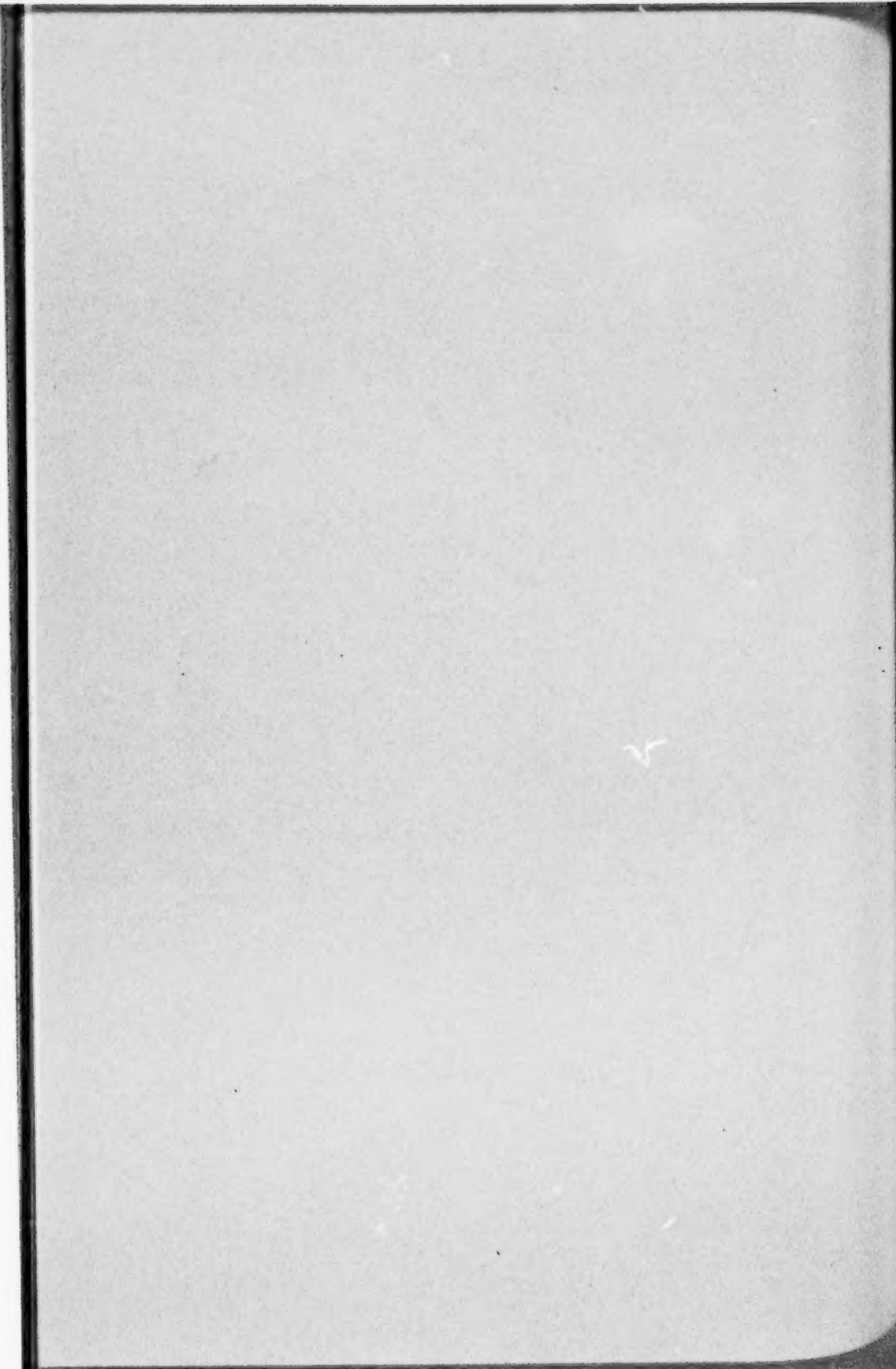
WILLIAM J. SOEDER and
EDWARD A. SOEDER,
Petitioners,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit, and
BRIEF IN SUPPORT OF PETITION.

HENRY LAVINE,
JOSEPH EHRLICH,
Williamson Bldg., Cleveland, Ohio,
H. W. KISER,
Williamson Bldg., Cleveland, Ohio,
Counsel for Petitioners.



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WILLIAM J. SOEDER and
EDWARD A. SOEDER,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Circuit Court of Appeals For the Sixth Circuit.

Your petitioners respectfully pray for a writ of Certiorari to review the decision of the United States Circuit Court of Appeals for the Sixth Circuit in the above case.

The petitioners seek a review of the judgment of the United States Circuit Court of Appeals for the Sixth Circuit which affirmed a conviction by a jury in the District Court of the Northern District of Ohio at Cleveland, and a sentence that each of the petitioners serve in a penal institution for one year and one day and pay a fine of \$5,000.00 and the costs of the Court.

CHARGES IN THE INDICTMENT.

The indictment charged in Counts one and two that the Corporation, during the calendar year of 1936, derived and received a net income from business in the sum of \$36,276.17, upon which net income the Corporation income and excess profits taxes of \$12,461.67 were due, but that

the Corporation filed an income tax return for said year showing a net loss of \$3,457.91, and paid no income or excess profits taxes; and that Edward A. and William J. Soeder, President and Secretary-Treasurer, respectively, of the Soeder Sons Milk Company, procured, counselled and advised the preparation and presentation of a false and fraudulent return (Count one), and (Count two) attempted to defeat and evade the income and excess profits taxes upon the net income of the Corporation for said year.

The indictment further charged in Counts three and four that the corporation, during the calendar year of 1937, derived and received a net income from business in the sum of \$9,732.27, upon which net income the corporation income and excess profits taxes of \$2,004.90 were due, but that the corporation filed an income tax return for said year showing a net loss of \$2,241.96, and paid no income or excess profits taxes; and that Edward A. and William J. Soeder, President and Secretary-Treasurer, respectively, of the Soeder Sons Milk Company, procured, counselled and advised the preparation and presentation of a false and fraudulent return (Count three), and (Count four) attempted to defeat and evade the income and excess profits taxes upon the net income of the Corporation for said year.

THE STATUTES INVOLVED.

The pertinent sections of the U. S. Code with reference to these laws are Title 26, Section 3793(b)(1) that,

“any person who wilfully aids or assists in, or procures, counsels or advises the preparation or presentation under, or in connection with any matter arising under the internal revenue laws, or a false or fraudulent return, shall be guilty of a felony,”

and upon conviction thereof be punished accordingly; and Title 26, Section 145 (b) that

“any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or

the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony,"

and upon conviction thereof be punished accordingly.

Title 26, Section 52, of the United States Code, provides that,

"every corporation subject to taxation under this chapter shall make a return stating specifically the items of its gross income and the deductions and credits allowed by this chapter, and such other information for the purposes of carrying out the provisions of this chapter as the Commissioner, with the approval of the secretary, may by regulations prescribe. The return shall be sworn to by the president, vice-president or other principal officer, and by the treasurer, assistant treasurer or chief accounting officer."

SUMMARY OF THE MATTER INVOLVED.

The Petitioners are brothers engaged in the wholesale milk business in Cleveland for many years, and at all times mentioned they were the sole owners and operators of a dairy business under the name of **The Soeder Sons Milk Company**, which business was not incorporated.

They were charged in a four count indictment with being officers of "**The Soeder Sons Milk Company**, a Corporation duly organized and existing under and by virtue of the laws of the State of Ohio," owing a duty to file excess profits and income tax returns for such Corporation, and that, as such officers, they did not file a true return and attempted to evade and defeat a tax due the Government.

The Prosecution's claim was that the entries in the alleged corporation's books were improper, because they did not include all receipts and because some entries were made to appear as loans to the business from these Petitioners when, in fact, it should have been entered as income for income tax purposes, thereby evading the payment of taxes due the Government.

The Petitioners established, by testimony, that out of their own funds they gave secret rebates in excess of thirty five thousand dollars, and that during the bank holiday they advanced sums in excess of \$43,000.00, making a total of nearly \$80,000.00; that because they were compelled to give secret rebates to their customers to meet the competition of the trade at that time, and because of the existence of a State law known as "The Burk-Herner Act," which prohibited the giving of rebates and discounts, they therefore, did not enter these rebates on their books for deduction purposes, but instead credited themselves with various sums from the receipts of the business and entered such credits to themselves as loans from them to the business. The evidence showed that they did so in order to pay themselves back for the monies they advanced for these secret rebates and the testimony is that their accounts balanced and that there was no money due to the Government for taxes. The evidence further shows that many of their customers testified to having received these secret rebates from these Petitioners and showed where they had entered them on their books and paid income tax thereon to the Government. Although the Prosecution admitted that rebates were given, they disallowed them because the taxpayer did not "put it on the books" and they would not take the trouble to investigate the customers' books although they did examine such books for other purposes. This of course made the entries appearing in the books as credits entirely without foundation and they called it fraud.

Although the Indictment alleged that **The Soeder Sons Milk Company** was a corporation duly organized and existing by virtue of the laws of the State of Ohio, the fact is that there never was such a corporation organized and existing under the laws of Ohio, and that not only did the Prosecution fail to prove the existence of such a corporation, but the Defense proved the non-existence of such corporation. All that the Prosecution established which might

go to show the existence of a corporation was that the income tax returns were filed as a corporation; the bank account which was in the name of **The Soeder Sons Milk Company**, and the checks signed by these Petitioners as officers; also the sales slips and vouchers to customers. Nothing more.

The Petitioners established that the reason they filed as a corporation was because the Internal Revenue Office at Cleveland insisted that they do so. This was about seven years before the return of this Indictment and came about when the bookkeeper of **The Soeder Sons Milk Company** informed the Internal Revenue office that the business was not a corporation, but was owned by these two brothers as partners and showed a letter received from the Secretary of State of the State of Ohio, of the Franchise Tax Division, which letter stated that the State does not recognize **The Soeder Sons Milk Company** as a corporation and returned a check which had been sent for franchise tax to the State. Further testimony was that the business was conducted as a family affair and that there was a continuous commingling of funds.

When the Prosecution rested, counsel for Petitioners moved for a directed verdict, one of the grounds being that the Government failed to prove a material allegation in the Indictment, to-wit: That these Petitioners were officers of a corporation duly organized and existing under and by virtue of the laws of the State of Ohio. Before ruling on this Motion, the Court permitted the Prosecution to reopen its case and then the Prosecution introduced into the evidence, over the objection of these Petitioners, a certified copy of a charter styled "*The Soeder Sons Company*," which charter had been twice issued and twice canceled. The last cancellation being sixteen years before the Indictment. Although the name appearing in the Indictment, **The Soeder Sons Milk Company**, was entirely different from the name appearing on this copy of the charter for *The*

Soeder Sons Company, the Court nevertheless admitted it into the evidence and it remained in the case without a scintilla of proof that *The Soeder Sons Company* is the same as **The Soeder Sons Milk Company**.

The Prosecution then again rested its case.

Petitioners claimed that material variance and asked that it be stricken, but were overruled.

Petitioners then requested special instructions in the Charge to the Jury, submitting this question to the Jury as to the corporate existence of **The Soeder Sons Milk Company**. Special requests were denied. The requests denied in this connection are discussed in the Brief herein and are identified as Assignments of Error Nos. 1 and 3, also 15 and 23. Special exception to the charge with request that the question of corporate existence be submitted to the jury were then made and overruled. The question of rebates as discussed in the Brief herein under Assignments of Error Nos. 20 and 21 we claim is the most important legal question herein. In the lower Court the prosecution admitted that rebates were given, but contended that same were not deductible because they were given in violation of a State law, the Burk-Herner Act, and were therefore contrary to public policy. The Circuit Court of Appeals left this question unanswered.

The Circuit Court also ignored requests for rulings on Assignments of Error Nos. 19 and 24 which we claim were charges that the Court should have given to the jury.

JURISDICTION.

The jurisdiction of this Court is involved under Title 28 U. S. C. Section 347 (a) of the Judicial Code as amended March 3, 1911, February 13, 1925, January 31, 1928 and June 7, 1934.

The verdict was affirmed on April 20th, 1944. Re-hearing thereon was denied May 22, 1944, and the time for filing the petition for certiorari expires on the 27th day of June, 1944.

REASONS FOR GRANTING THE WRIT.

Although counsel for Petitioners in Brief and argument in the Circuit Court of Appeals contended that **The Soeder Sons Milk Company** was not a corporation, and that there was no evidence at all introduced that the Petitioners were operating their business as a corporation, and, in spite of the testimony in the record to the effect that the State of Ohio had refused to recognize the Petitioners' business as a corporation, and that there were no stock Certificates issued; no Board of Directors; no arrangements for continuity of business after death; no limitations of liability, the Court of Appeals nevertheless held that they conducted their business as a corporation or association taxable as a Corporation within the meaning of Revenue Act of 1936.

The Court of Appeals in its judgment entered on April 20, 1944, decided that the principal grievance of the Appellants was failure of proof to show the legal existence of the corporation under the laws of Ohio, but because the returns were filed as the returns of a corporation and that the business had been conducted as a corporate business, and a corporation being defined in the applicable statute of the Revenue Act of 1936 in Section 1001 (a) (2) thereof with such breadth as to include within its ambit *de facto* corporations and associations, the Court, therefore, held that there was no error in the instruction of the Court that the alleged acts were on behalf of the corporation without submission to the jury of a question of fact in respect to its legal existence, and finding no other substantial errors in the record, it is ordered that the judgments below be and they are hereby affirmed.

Petitioners say that such holding is contrary to the holding of the United States Supreme Court.

Petitioners aver that by such holding the Circuit Court of Appeals is deciding an important question of general law in a way probably untenable and in conflict with the

weight of authority, and that such holding is probably in conflict with applicable decisions of the Supreme Court.

In view of the Prosecution's failure to prove the corporate existence and the Defense proof that there was no such corporation chartered it conclusively established that there was no *de jure* corporation; then the Prosecution's failure to prove that the business was conducted as that of a corporation or association taxable as a corporation in line with the holdings of the United States Supreme Court and failure to prove that the State of Ohio ever recognized The Soeder Sons Milk Company as a corporation in any manner at all, then the claim of *de facto* corporation is untenable here because the facts and circumstances do not establish *de facto* existence and the Circuit Court was probably in error when it indicated that this was a *de facto* corporation or association within the Revenue Act.

Petitioners further say that such holding by the Circuit Court amounts to a departure from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision under Sections 237 (b) and 240 (a) of the Judicial Code as amended on February 13, 1925.

The Circuit Court failed to mention the important question of Rebates given as signified by Assignments of Error 20 and 21 which is set forth on pages 52 and 53 of Vol. I, in the Transcript of Record. This question is, in the opinion of counsel, the most important in the case and the legality of these rebates and their deductibility is the crux of the entire case bearing on the question of wilfulness and fraud.

The question of material variance because of the introduction of a charter of *The Soeder Sons Company* which was claimed to be the same as **The Soeder Sons Milk Company** was entirely omitted by the Circuit Court, al-

though counsel stressed both in Brief and Argument the timely objection to such introduction, and the importance that if such exhibit be admitted at all, that it be submitted to the Jury to decide whether *The Soeder Sons Company* is the same as **The Soeder Sons Milk Company** as per Assignment of Error No. 2, pages 35 and 36 of Transcript of Record.

Petitioners say that in the rulings and judgments made by the lower courts that the courts erred to the prejudice of the petitioners.

Wherefore, your petitioners pray for allowance of a writ of certiorari from the United States Court of Appeals for the Sixth Circuit to the Supreme Court of the United States and the judges thereof to the end that the record in this case may be removed into the Supreme Court of the United States and the errors complained of by your petitioners may be examined and corrected and said judgment reversed and set aside and judgment rendered for petitioners.

EDWARD A. SOEDER,

WILLIAM J. SOEDER,

By HENRY C. LAVINE and

H. W. KISER,

Their Attorneys.



In the Supreme Court of the United States

OCTOBER TERM 1944.

No.

WILLIAM J. SOEDER and
EDWARD A. SOEDER,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONERS

In Support of Petition for Writ of Certiorari.

The Petitioners were convicted by a jury in the District Court of the United States at Cleveland, Ohio, and were each sentenced to serve a year and a day in a penal institution and to pay a fine of \$5,000.00. This conviction was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit. The Judgment of the Circuit Court is hereto attached and marked "Appendix No. 1."

A summary of the matter involved is contained in the Petition for Writ of Certiorari, pages 3-6. The Indictment charged the Petitioners as officers of a Corporation with counselling, procuring and advising the preparation and presentation of a false and fraudulent return (Count one and Count three), and with attempting to defeat and evade the income and excess profits taxes (Count two and Count four), upon the net income of the alleged Corporation.

These Petitioners have denied that they diverted any funds from a corporation for fraudulent purposes and to defeat taxes. They stated that their business was owned

by them exclusively and that it was operated as a family affair; that they employed a public accountant and that this accountant had full charge of the books; that they were not a corporation and that no application for a charter was made by them for **The Soeder Sons Milk Company**, and that there was no franchise tax paid; no minute books; no board of directors; no stock certificates; that their auditor in 1935 advised the Internal Revenue Bureau that **The Soeder Sons Milk Company** was not a corporation and that he desired to file their income tax returns accordingly, but that the Bureau insisted that these returns be filed as **The Soeder Sons Milk Company, a Corporation**, on corporation forms and that is the reason why these returns were filed on corporation forms.

In their statements they stated that they frequently advanced monies as additional investment in their business and that they gave thousands of dollars as rebates to their customers in order to stay in business and compete with the other dairies which also gave rebates as per testimony in the record; that these rebates were given secretly because of the existence at that time of the Burk-Herner Act of the State of Ohio, which prohibited rebates and discounts. Because of that they did not put it on their books, but in order to balance their books for income tax purposes, they set up various amounts of receipts as credits to themselves and called them loans from themselves to the business, in order to off-set and reimburse themselves for this money expended in behalf of their business. The testimony showed that they advanced more than \$35,000.00 in rebates and that they expended more than \$43,000.00 in cash for other purposes and that this was their method of reimbursing themselves in order not to pay double income tax. The record shows that many of the customers testified of having received many thousands of dollars in cash rebates and that these customers entered said rebates on their books for income tax purposes. They contended that the manner of keeping their books balanced these accounts.

The Prosecution admitted that they knew that these rebates were given but that they did not give them any credit for it, because the tax payer did not enter these rebates on their books and further, that if the tax payer didn't take the trouble to enter them, they couldn't see the necessity for allowing it. This statement was made by the chief government investigator, though he admitted he examined these customers' books for other purposes in connection with this investigation.

Because of that, counsel for these Petitioners requested Special Instructions in the Charge, being identified as "Assignments of Error No. 20 and No. 21," which are as follows:

ASSIGNMENT OF ERROR NO. 20.

"The Court further instructs the Jury as a matter of law, a taxpayer is entitled to deduct from his income taxes and is to be given credit for all the necessary and ordinary expenses paid or incurred during the taxable year in carrying on any trade or business including rebates or discounts on merchandise actually sold. Therefore if you find from the evidence that these defendants gave rebates and discounts on merchandise actually sold by them and if you further find that such rebates and discounts were ordinary and necessary expenses paid or incurred during the taxable year, then you must find that these rebates and discounts were deductible items and that the defendants had a right to deduct said rebates and discounts from the income tax returns and you must in your computations of income tax liability if any, take into consideration and give due credit and allowances for all such rebates and discounts. And I further charge you that you should give full credit and allowance for such rebates and discounts even though none of such rebates and discounts appear on the books of the corporation and even though said rebates and discounts were given, if you find that they were so given, during the time of the existence of the Burke Act."

and the Court's refusal to so charge or give his own charge on rebates probably constituted reversible error.

ASSIGNMENT OF ERROR NO. 21.

"The Court further instructs you that if you find that these defendants gave rebates and discounts and if you further find that said rebates and discounts were an ordinary and necessary expense and if you further find that said rebates and discounts were otherwise proper deductions for the years in question, the fact that at that time, 1933 to 1935, there was a State law known as the Burke Act prohibiting the giving of rebates should not enter into your deliberations in computing any tax wilfully evaded if you find any such evasion of tax and you must not take the existence of that law into account in the deciding and allowing of any of these deductions if you find them otherwise allowable and deductible. In other words the existence of the Burke Act has in itself no bearing on the deductibility of the rebates and discounts in question."

and the Court's refusal to so charge or give his own charge on rebates probably constituted reversible error.

In this connection there is testimony that these rebates were necessary in order to protect the interests of **The Soeder Sons Milk Company**, to keep it alive and as a going business. Because of that such rebates became an ordinary and necessary expense and deductible as such.

As we stated before, the question of rebates is so bound up with the question of fraud that it constitutes the most important legal question here. The Government counsel cited several cases in his Brief that such rebates are not deductible, principally because they were given secretly and in violation of a state statute, and were, therefore, paid contrary to "public policy," and he goes on to say, in his brief, that the holding of the Courts on illegal expenditures are such that they would not be permitted to be deductible as "ordinary and necessary business expenses."

We believe that the Court's failure to charge on this important question of rebates constitutes prejudicial and reversible error and we believe the Government counsel's contentions in his argument and brief that such rebates were not deductible because of being contrary to "public policy" is also untenable.

It is our contention that in the latest case decided by the United States Supreme Court, being the case of *Heininger vs. Commissioner*, in volume 64, Supreme Court Reporter (advance sheets No. 4), sustaining the Court of Appeals, the Court says:

"Upon being served with notice of the proposed Fraud Order, Respondent was confronted with a new business problem which involved far more than the right to continue using his old advertisements. He was placed in a position in which not only his selling methods, but also the continued existence of his lawful business were threatened with complete destruction.

"So far as appears from the record, Respondent did not believe, nor under our system of jurisprudence, was he bound to believe, that a Fraud Order destroying his business was justified by the facts or the law. Therefore, he did not voluntarily appeal the business, but defended it by all available legal means.

"To say that this course of conduct and the expenses which it involved were extraordinary or unnecessary, would be to ignore the ways of conduct and the forms of speech prevailing in the business world" * * * "it has never been thought, however, that the mere fact that an expenditure bears a remote relation to an illegal act makes it nondeductible. The language of section 23 (A) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible * * *.

"However, as we have pointed out above, the Board of Tax Appeals here denied the claimed deduction not by an independent exercise of judgment, but upon a mistaken conviction that denial was required as a matter of law.

"We, therefore, affirm the judgment of the Circuit Court of Appeals, reversing and remanding the cause to the Board of Appeals."

On the question of corporate existence:

The evidence showed that there was no charter; no application for a charter which, of course, means that it could not be a corporation *de jure*. Then to become a corporation *de facto* it is necessary that an attempt to organize under the law must have been made and that during the time mentioned in this case, the State of Ohio must recognize the existence of a corporation either by assessment of franchise tax or otherwise. It goes without saying that the mere using of a name of a corporation is not sufficient.

The only resemblance of **The Soeder Sons Milk Company** to a corporation is the fact that their returns were filed on corporation forms. This is explained in the testimony of their Auditor when he testified that he notified the Internal Revenue office at Cleveland that the business is not incorporated, but they insisted that he file as a corporation. But we submit to the Court that the mere act of filing returns on corporation forms, or the absence of the usual terminology of corporations cannot be called decisive.

Testimony that the concern did business "as a corporation" is also insufficient to establish corporate existence and proof that a concern did business under a corporation name does not show a corporate existence since that fact is consistent with the existence of a partnership.

In the case of *Harrill vs. Davis*, 168 Federal, 187, the Court holds that:

"Individuals cannot acquire any corporate existence whatever, either *de jure* or *de facto*, by merely adopting a name importing a corporation, and assuming to be and to act as a corporation without color of any lawful authority. Mere user alone is not sufficient."

On the question of an association taxable as a corporation, the record is barren of any features that could place **The Soeder Sons Milk Company** in that class. The Supreme Court has recognized five salient features of a corporation:

1. Title to the property held by the entity.
2. Centralized management.
3. Continuity uninterrupted by deaths.
4. Transfer of interest without affecting continuity.
5. Limitation of personal liability of the participants.

None of the above features can be found in the case at bar.

In the case of *Morrissey vs. Commissioner*, 296 U. S. 344, the Supreme Court held:

“It has been said that no inelastic rule can be advanced to settle the question, due to the variety of circumstances under which it may arise, but that the facts of each case must control its determination.”

We find two legal questions of importance in this case. First, whether the Court of Appeals was right in affirming the right of the Trial Judge to charge the jury that **The Soeder Sons Milk Company** was a corporation as a matter of law, and his refusal to submit the question to the jury as a question of fact in this case as per special exception to the charge to the jury. Second, if the Court did have the right to charge the jury in that manner, was there sufficient evidence before the Court to warrant the Appellate Court's finding that the Prosecution established a *de facto* corporation or association under the Internal Revenue Statute.

Our answer to the first question is that we believe the question of corporate existence in this case should have been established by the prosecution when it rested its case and having failed to do so, the motion to direct a verdict,

as identified by the following Assignments of Error, should have been granted.

ASSIGNMENT OF ERROR NO. 1.

The Court erred in denying the motion made on behalf of defendants, at the end of the government's case, to dismiss the indictment on the ground that the evidence was insufficient as a matter of law to sustain any count in the indictment, particularly in the government's failure to offer proof that the Soeder Sons Milk Co. was a "corporation duly organized and existing under the laws of the State of Ohio," as alleged in the indictment. To which ruling of the Court counsel there and then took exception.

The appellants' contention throughout the case is that in this case, the legal existence of the corporation is an essential element of the crime charged and must be proven by the prosecution.

ASSIGNMENT OF ERROR NO. 2.

The Court erred in granting leave to the prosecution to reopen the case for the purpose of offering in evidence government exhibit No. 65, which was an exemplified document or certified copy of a charter styled The Soeder Sons Company, which charter was cancelled by the state in 1926. To which ruling of the Court, and to the introduction of such document, counsel there and then took exception. The grounds for the objection are that the name The Soeder Sons Company indicates a different organization, and its charter expired in 1926, whereas the indictment charges that The Soeder Sons Milk Company was a corporation duly organized and existing under the laws of the State of Ohio during the years 1934, 1935, 1936 and 1937. Counsel also claimed that such evidence would only tend to confuse the jury.

ASSIGNMENT OF ERROR NO. 3.

The Court erred in denying the motion made on behalf of the defendants at the end of the case, a pertinent part of which is as follows:

"I move at this time that the Court take the case from the jury and direct a verdict in favor of the defendants because not only has the government failed to prove the existence of a corporation duly organized under the laws of the State of Ohio, but the defense has now proved that there is no such corporation and never was, and the allegation 'a corporation duly organized and existing under and by virtue of the laws of the State of Ohio' is a material and important allegation in this indictment."

In its ruling on this motion, the Court stated:

"I believe I have heard all I want to. I understand your position clearly. I stated to you at the end of the government's case, and I will re-state it, the Court is going to charge this jury that for the purpose of the Internal Revenue Laws under which this indictment is drawn, the Soeder Sons Milk Company was required to make a return as a corporation for the calendar years of 1936 and 1937, and that is the Court's view of the law, and that is what the Court is going to charge the jury, and that will be their starting point. It is not going to be submitted to the jury as a question of fact for their decision. Your motion is overruled."

To all of which counsel took an exception.

ASSIGNMENT OF ERROR NO. 15.

The Court erred in its charge to the jury in the following language:

"For the purpose of the Revenue Act, under which this indictment has been returned, I charge you as a matter of law, that the Soeder Sons Milk Company was a corporation during the period covered by this indictment, and that the Soeder Sons Milk Company was required to make a true return of its income, if any, as a corporation, and was required to pay an in-

come tax, if any, in fact, was due, as a corporation. The Soeder Sons Milk Company has been required, under the law, to file a corporation income and excess profits tax return for the calendar years of 1936 and 1937, on or before March 15th, 1937 and 1938 respectively."

ASSIGNMENT OF ERROR NO. 23.

We believe Defense was entitled to the following requested charge No. 11—Assignment of Error 23 (R. 54, Vol. I)—in view of the charge in the indictment and the failure to prove the corporate existence:

"The government claims that these defendants attempted to defeat the tax of a corporation, The Soeder Sons Milk Company, by preparing and presenting a false income tax return for the year 1936 to 1937. It is the duty of the government to prove every material fact charged in the indictment. I therefore charge you that it becomes the duty of the government to affirmatively establish that there was such a corporation, The Soeder Sons Milk Co., upon which such tax could fall. Therefore if you find from the evidence that the government failed to affirmatively establish the existence of a corporation, the Soeder Sons Milk Co. as named in the indictment, then you must find the defendants not guilty as charged in the indictment."

When the Court permitted the reopening of the case and admitted into the evidence the copy of cancelled charter for a corporation styled *The Soeder Sons Company*, it certainly created a question of fact for a jury to decide whether the charter of *The Soeder Sons Company*, cancelled sixteen years before this indictment, is the same as **The Soeder Sons Milk Company** named in the indictment. This added to other uncertainties in the case and to the effect or weight of evidence, and we believe is in line with the following holding in the case of *Gunning v. Cooley*, 281 U. S. 90:

“Where uncertainty arises from a conflict in the testimony * * * the question is not one of law but of fact to be settled by the jury.”

Our answer to the second question is that the Prosecution failed to establish *de facto* existence in the following respects:

There are two requisites for a *de facto* corporation. (1) It must appear to be acting under color of law. (2) It must be recognized by the State as such.

This is the holding in the case of *Tulare Irrigation District v. Shepard*, 185 U. S. 1:

“In proceedings where the question whether a corporation exists or not arises collaterally, the Courts will not permit its corporate character to be questioned, if it appears to be acting under color of law, and recognized by the State as such.”

In the case at bar the State of Ohio did not recognize **The Soeder Sons Milk Company** as a corporation, because it refused to accept franchise taxes and returned the check with a statement to that effect. Therefore, one of the requisites of the existence of a corporation is lacking and we, therefore, believe the Court of Appeals was in error.

WHEREFORE, it is respectfully prayed that the Petition herein be granted.

Respectfully submitted,

HENRY LAVINE,

H. W. KISER,

Counsel for Petitioners.

APPENDIX NO. 1.

JUDGMENT

of the

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

Upon an appeal from the conviction of the above-named appellants upon an indictment charging them with felonious counsel and advice in the preparation of a false and fraudulent return made by a corporation in its income and excess profit return for 1936, and the principal grievance of the appellants being failure of proof to show the legal existence of the corporation under the laws of Ohio, but,

It also appearing that the returns were filed as the returns of a corporation and that the business had been conducted as a corporate business, and a corporation being defined in the applicable statute of the Revenue Act of 1936 in . . . 1001 (a) thereof with such breadth as to include within its ambit *de facto* corporations and associations,

We find no error in the instruction of the court that the alleged acts were on behalf of the corporation without submission to the jury of a question of fact in respect to its legal existence, and finding no other substantial errors in the record,

IT IS ORDERED That the judgments below be and they are hereby

AFFIRMED.



JUL 25 1944

THOMAS BRIDGE OGDEN
CLERK

No. 195

In the Supreme Court of the United States

OCTOBER TERM 1944

WILLIAM J. SOEDER AND EDWARD A. SOEDER,
PETITIONERS

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 195

WILLIAM J. SOEDER AND EDWARD A. SOEDER,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court delivered no opinion. The opinion of the Circuit Court of Appeals (R. 643-644) is reported at 142 F. (2d) 236.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 20, 1944 (R. 643-644). A petition for rehearing was denied on May 22, 1944 (R. 659). The petition for a writ of certiorari was filed on June 26, 1944. The jurisdiction of this Court is invoked under Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioners, who are the sole stockholders and officers of a milk company, were convicted of procuring and counselling the preparation and filing of false and fraudulent tax returns of the company for the years 1936 and 1937, and of attempting to evade the company's taxes for such years. The questions apparently presented by the petition¹ are as follows:

1. Did the trial court err in refusing to charge the jury, as requested by petitioners, that the company, which kept its books on the accrual basis, was entitled to deduct for 1936 and 1937, if found to be ordinary and necessary business expenses, certain payments made to petitioners during those years to reimburse them for unlawful rebates given to customers of the company in 1933, 1934, and 1935?

2. Did the trial court err in charging the jury as a matter of law that the company was to be regarded as a corporation under Section 1001 (a) (2) of the Revenue Act of 1936, and hence was required to file income and excess-profits tax returns for the years 1936 and 1937?

¹ The petition contains no specific statement of the questions presented, as required by Rule 38 (2). While a failure to comply with this requirement may be sufficient reason for denying the petition (Rule 38 (2), and cases cited), we shall undertake to show that the petition also fails on the merits.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 11-13.

STATEMENT

Petitioners, William J. Soeder and Edward A. Soeder, are secretary-treasurer and president, respectively, of Soeder Sons Milk Company (R. 60, 63, 622), and each owns fifty per cent of the company's stock (R. 590). On May 12, 1943, they were convicted in the District Court for the Northern District of Ohio, Eastern Division, of procuring, counseling and advising the preparation and presentation of false and fraudulent tax returns of Soeder Sons Milk Company for the years 1936 and 1937, and of attempting to defeat and evade income and excess profits taxes of the company during such years (R. 24-25). Each was sentenced to imprisonment for one year and a day, and fined \$5,000 and costs (R. 26-28). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the convictions were affirmed (R. 643-644).

The evidence relating to each of the questions presented may be summarized as follows:

1. Soeder Sons Milk Company engaged in a general dairy business in Cleveland, Ohio (R. 589). From June 22, 1933, to July 1, 1935, there was in effect in Ohio a statute commonly called the Burk-Herner Act (Throckmorton's Ohio Code, Annotated (1940 Ed.), Sections 1080-1 to 1080-23, inclusive), which established a general scheme of

regulation of the milk industry in the state. The statute made unlawful the sale of milk at a price lower than the minimum prescribed by the Ohio Milk Marketing Commission. Petitioners violated the Act by secretly paying cash rebates to numerous customers of Soeder Sons Milk Company (R. 90, 94, 97, 362, 373, 383, 385, 387). During all of the years in which the Act was in effect, as well as in 1936 and 1937, the years involved in the indictment, some of the company's income was diverted directly to petitioners and was neither recorded as income on the company's books nor reported in its tax returns (R. 96-100, 604-605). The company's bookkeeper testified that from 1934 to 1938 varying amounts of cash receipts were segregated and paid directly to the petitioners as reimbursement to them for the rebates which they had paid to the customers (R. 96-100). Petitioners made no attempt to show the extent, if any, to which the income so diverted in 1936 and 1937 represented rebate payments for which petitioners had not been reimbursed in prior years.

The books of the company were kept on the accrual basis (R. 399).

Petitioners requested the trial court to charge the jury that in computing the income-tax liability for the taxable years involved, the jury should deduct all rebates and discounts which were found to be ordinary and necessary business expenses during such years, even though such payments

were made in violation of the Burk-Herner Act (Requests Nos. 8 and 9, R. 583-584). The court refused to give such an instruction, but charged the jury that petitioners were not guilty of fraud if they merely attempted to reduce taxes by honestly claiming deductions to which they believed the company was legally entitled (R. 556).

2. On January 2, 1922, petitioners and three others (Henry Soeder, Daisy Soeder, and Elmer G. Derr) executed articles of incorporation of "Soeder's Sons Company" for the purpose of carrying on a general dairy business in Cleveland (R. 638). These articles were cancelled by the Secretary of State of Ohio on February 15, 1924, for failure to pay franchise taxes, were reinstated on January 22, 1935, and were again cancelled for the same reason on February 15, 1926, without subsequent reinstatement (R. 359). Some time thereafter the company began to use the name "Soeder Sons Milk Company" instead of "Soeder's Sons Company" (R. 590). Petitioners intended to amend the articles of incorporation to show this change of name, but no such action was actually taken (R. 590). A state corporation franchise tax return for the year 1934 was filed by the company with the Secretary of State of Ohio in 1935, but was returned by him with the statement that he had no record of a corporation

by the name of "Soeder Sons Milk Company" (R. 418). A personal-property tax return for the year 1934 was filed with the Ohio Department of Taxation by the company as a corporation (R. 340). During 1935 the corporation's tax accountant discussed with a representative of the Bureau of Internal Revenue the question whether the company should continue to file corporate income-tax returns, and was advised that it should (R. 418). Petitioners frequently referred to themselves as officers and stockholders of the corporation (R. 63, 104, 108, 176, 377, 438-439, 589-590, 622), and they described the company as a corporation (R. 590, 622).

The trial court charged the jury as a matter of law that the Soeder Sons Milk Company was a corporation for tax purposes (R. 553), and refused to grant petitioners' requested charge that the corporate status of the company was a question of fact to be determined by the jury (R. 585).

ARGUMENT

1. The refusal of the trial court to give the requested instructions charging the jury to deduct the rebate payments if found to be ordinary and necessary business expenses was clearly correct on two separate grounds.

First, since the company kept its books on the accrual basis, any deductions for rebates, if allowable at all, were allowable only for 1933, 1934, and 1935, the years in which they were actually paid

to the customers and in which the sales to which they relate were made. The years involved in the indictment are 1936 and 1937. The Burk-Herner Act expired on July 1, 1935. No comparable statute was in effect during 1936 and 1937, and there is no evidence in the record of any rebate payments made in 1936 or 1937 or with respect to 1936 and 1937 sales.

Secondly, since the rebates were paid in violation of law, they were not deductible as ordinary and necessary business expenses under Section 23 (a) of the Revenue Act of 1936, Appendix, *infra*, p. 11. *Great Northern Ry. Co. v. Commissioner*, 40 F. (2d) 372 (C. C. A. 8), certiorari denied, 282 U. S. 855; *Burroughs Bldg. Material Co. v. Commissioner*, 47 F. (2d) 178 (C. C. A. 2); *Chicago, R. I. & P. Ry. Co. v. Commissioner*, 47 F. (2d) 990 (C. C. A. 7), certiorari denied, 284 U. S. 618; *Tunnel R. R. v. Commissioner*, 61 F. (2d) 166 (C. C. A. 8), certiorari denied, 288 U. S. 604; *Rugel v. Commissioner*, 127 F. (2d) 393 (C. C. A. 8); *Helvering v. Superior Wines & Liquors*, 134 F. (2d) 373 (C. C. A. 8); *Harden M. Loan Co. v. Commissioner*, 137 F. (2d) 282 (C. C. A. 10), certiorari denied, 320 U. S. 791. *Commissioner v. Heininger*, 320 U. S. 467, upon which petitioners principally rely, does not support their contention. The deduction permitted there was a lawful payment of attorneys' fees incurred in defending a business against a fraud order of the Post Office Department. In this case

the rebate payments constituting the alleged deductions were themselves unlawful.²

The only significance of the rebate payments was their bearing on the question whether petitioners honestly thought such payments were deductible, and were therefore not guilty of wilfully attempting to evade taxes. As has already been noted, however, the jury were properly instructed by the court on this question, and no complaint is made here in that regard.

2. The evidence in the record clearly shows that the business of Soeder Sons Milk Company was conducted as a corporation, and that petitioners referred to it as a corporation and described themselves as officers and stockholders thereof. No evidence was presented to the contrary. Since the facts were undisputed, the question of corporate existence—i. e., the legal significance of such facts—was one of law to be determined by the court. See 8 Fletcher, *Cyclopedia of Corporations*, Sec. 3784, p. 79, Sec. 4061, p. 541.

Petitioners' contention that the ruling of the lower court on this point was erroneous is not founded on any evidence showing that the business was not conducted as a corporation. Rather,

² In the *Heininger* decision this Court cited *Great Northern Ry Co. v. Commissioner*, *Burroughs Bldg. Material Co. v. Commissioner* and *Rugel v. Commissioner*, *supra*, with apparent approval as examples of the basic principle governing the nondeductibility of expenditures proscribed by federal or state policies.

it is based wholly on the supposition that the corporation's existence had been terminated as a legal consequence of the cancellation of its articles of incorporation by the Secretary of State of Ohio in 1926. The fallacy of petitioners' argument lies in the erroneous premise that the cancellation of the articles of incorporation for nonpayment of franchise taxes terminated the existence of the corporate entity. The Supreme Court of Ohio has held to the contrary. *Eversman v. Shipman Co.*, 115 Ohio St. 269; *Sweeny v. Driller Co.*, 122 Ohio St. 16. In construing Sections 5509 to 5513, inclusive, of the Ohio General Code, the court held in these cases that cancellation of the articles of incorporation by the Secretary of State for nonpayment of franchise taxes, pursuant to Section 5509, does not automatically terminate the existence of the corporation, and that even after such cancellation the final power to forfeit and annul corporate privileges and franchises rests in a court of competent jurisdiction to be exercised in a *quo warranto* proceeding.

Nor was the corporate existence terminated by the insertion of the word "Milk" in the name of the company, in view of the well-established principle that a change in name, even though unauthorized or legally insufficient, neither affects the continued existence of a *de jure* or a *de facto* corporation nor converts a *de jure* corporation into a *de facto* one. 8 Fletcher, *Cyclopedia of Corporations*, Sec. 3782, p. 78.

The District Court was wholly justified, therefore, in concluding that the company had the status of a corporation under state law. But, in any event, under Section 1001 (a) (2) of the Revenue Act of 1936, Appendix, *infra*, p. 13, the company would be taxable as a corporation even if it were only a *de facto* corporation or an unincorporated association. *Hecht v. Malley*, 265 U. S. 144; *Morrissey v. Commissioner*, 296 U. S. 344.

CONCLUSION

The decision below is correct. There is no conflict of decisions, and there is no occasion for further review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
ROBERT N. ANDERSON,
SPURGEON AVAKIAN,
Special Assistants to the Attorney General.

JULY 1944.





APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1114.

* * * * *

(c) Any person who willfully aids or assists in, or procures, counsels, or advises, the preparation or presentation under, or in connection with any matter arising under, the internal-revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

* * * * *

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * *

* * * * *

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the dividends paid credit provided in section 27) provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

* * * * *

SEC. 52. CORPORATION RETURNS.

Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title and such other information for the purpose of carrying out the provisions of this title as the Commissioner with the approval of the Secretary may by regulations prescribe. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer, assistant treasurer, or chief accounting officer. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

* * * * *

SEC. 145. PENALTIES.

* * * * *

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

SEC. 1001. DEFINITION.

(a) When used in this Act—

* * * * *

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.